Supreme Court, U.S.
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No. 89-576 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICHARD A. FREY, JR., Director,
Metropolitan Corrections Department,
THERESA BANKS and **VICKI WIMBS**,
Corrections Officers, and
WILLIAM P. ROSE and **LARRY NAJJAR**,
Corrections Sergeants - - - - - Petitioners

versus

KAREN B. MASTERS - - - - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

GREGORY A. BOLZLE
Counsel of Record

PATRICK W. MICHAEL
WOODWARD, HOBSON & FULTON
2500 First National Tower
Louisville, Kentucky 40202
(502) 585-3321
Counsel for Respondent

Due Date:
November 3, 1989

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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QUESTION PRESENTED

Are Petitioners entitled to qualified immunity from liability for their strip-search of Respondent, who was arrested for minor traffic offenses and whose conduct gave Petitioners no probable cause to believe she was concealing weapons or contraband?

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Corrections Sergeants - - - *Petitioners*

v.

KAREN B. MASTERS - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners strip-searched Respondent pursuant to a local jail policy requiring that "[a]ll newly admitted inmates to the department . . . be . . . strip-searched immediately prior to" entering the jail's general population (Petition, p. 12, n. 4). This is a blanket strip-search policy under any definition of the term.

Respondent was arrested in the middle of the afternoon while at home with her two children. The warrants issued for Respondent's arrest specified minor

traffic violations, but the real cause of her arrest—her purported failure to appear for a court hearing—was an equally minor offense. Neither Respondent's offense nor her conduct created any suspicion that she concealed weapons or contraband anywhere on her person, much less in a body cavity. The only justification for Respondent's strip-search was that she was about to enter the general population of the local jail.

SUMMARY OF ARGUMENT

Petitioners have no qualified immunity for their strip-search of Respondent because:

1. The unlawfulness of Petitioners' strip-search of Respondent was apparent in light of pre-existing law. Federal courts have consistently condemned blanket strip-searches of persons arrested for minor offenses, and have repeatedly held that strip-searches of minor offenders cannot be justified on the basis of administrative convenience.

2. *Dobrowolskyj* v. *Jefferson County,* 823 F. 2d 955 (6th Cir. 1987), *cert. denied,* — U.S. —, 108 S. Ct. 1012 (1988) is irrelevant to this case. *Dobrowolskyj* was rendered after, not before, Respondent's strip-search, and thus was not a part of the pre-existing law that established the constitutional parameters of Petitioners' conduct. Moreover, the Sixth Circuit concluded that its opinion in *Dobrowolskyj* was inapplicable to this case because Respondent, unlike Dobrowolskyj, was a minor offender.

3. The Consent Decree in *Tate* v. *Frey,* No. 75-0031-L(A) does not justify or endorse Petitioners' strip-search of Respondent. First, Respondent is not a member of the class made the subject of the Consent Decree. Second, the Consent Decree is ambiguous, and can be read to prohibit the strip-search to which Respondent was subjected in this case. Third, a consent decree is merely an agreement between litigants to settle pending litigation, and cannot constitute part of the pre-existing law against which Petitioners' conduct must now be measured.

ARGUMENT

I. The Scope of Qualified Immunity and "Clearly Established Law".

In *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), this Court described the defense of qualified immunity as follows:

> If the law at the time [of the incident complained of] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since *a reasonably competent official should know the law governing his conduct.*

Id. at 818 (emphasis added). The Court subsequently defined the scope of "clearly established law" in *Anderson* v. *Creighton,* 483 U.S. 635 (1987):

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.* . . ; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (emphasis added). Thus, pre-existing case law specifically condemning the particular conduct in issue is not required to defeat a claim of qualified immunity.

In its decision below, however, the Sixth Circuit measured Petitioners' conduct against a stricter standard of "clearly established law", one that required case law that directly prohibited the conduct alleged. The Sixth Circuit's standard was set forth in *Ohio Civil Service Employees Assn.* v. *Seiter,* 858 F. 2d 1171 (6th Cir. 1988):

> To find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its Court of Appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principal of law. *For the decisions of other courts to provide such "clearly established law" these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.*

Id. at 1177 (emphasis added).

In its opinion below, the Sixth Circuit concluded that blanket strip-searches of minor offenders had been so consistently and universally condemned for so long that this action constituted "an extraordinary case" under its opinion in *Seiter,* and justified reliance on decisions of the Fourth, Seventh, Ninth and Tenth Circuits condemning blanket strip searches of minor offenders (Petition, pp. 10a-13a). Even under its more restrictive test of "clearly established law", the Sixth Circuit concluded that the pre-existing decisions of the other circuits "point[ed] unmistakably to the unconstitutionality of the conduct complained of and . . . [left] no doubt in the mind of [Petitioners] that [their] conduct, if challenged on constitutional grounds, would be found wanting."

II. The Prohibition Against Blanket Strip-Searches of Minor Offenders Was Clearly Established.

"No published state or federal case since [1966] . . . upholds the constitutionality of a blanket policy of strip-searches of minor offense arrestees. . . ." *Ward* v. *County of San Diego,* 783 F. 2d 1385, 1388 (9th Cir. 1986). In *Bell* v. *Wolfish,* 441 U.S. 520 (1979), this Court stated that the kind of body-cavity search to which Respondent was subjected in this case "instinctively gives us the most pause," and after recognizing the Fourth Amendment's prohibition of unreasonable searches, said:

> The test of unreasonableness under the Fourth Amendment is not capable of precise definition or

> mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that this search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 558-59.

With these principles in mind, the federal courts have repeatedly condemned blanket strip-searches of persons arrested for minor offenses. As the Sixth Circuit recognized in *Dobrowolskyj* v. *Jefferson County*, 823 F. 2d 955 (6th Cir. 1987), *cert. denied*, — U.S. —, 108 S. Ct. 1012 (1988):

> The majority of the circuits have held unconstitutional blanket strip-search policies of all inmates including those detained only on minor misdemeanor or traffic offenses. These courts have held that automatic strip-searches of all detainees violate the Fourth Amendment without a reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest, that the detainee is concealing contraband.

Id. at 957, *citing Weber* v. *Dell*, 804 F. 2d 796 (2nd Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987); *Logan* v. *Shealy*, 660 F. 2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); *Stewart* v. *Lubbock County, Texas*, 767 F. 2d 153 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986); *Mary Beth G.* v. *City of Chicago*, 723 F. 2d 1263 (7th Cir. 1983); *Jones* v. *Edwards*, 770 F. 2d 739 (8th Cir. 1985); *Giles* v. *Ackerman*, 746 F. 2d 614

(9th Cir. 1984), *cert. denied,* 471 U.S. 1053 (1985); *Hill* v. *Bogans,* 735 F. 2d 391 (10th Cir. 1984); *Fann* v. *City of Cleveland,* 616 F. Supp. 305 (N.D. Ohio 1985); *Tinetti* v. *Wittke,* 479 F. Supp. 486 (E.D. Wisc. 1979), *aff'd,* 620 F. 2d 160 (7th Cir. 1980) (per curiam).

Before this case, the Sixth Circuit had not addressed the constitutionality of blanket strip-searches of minor offenders. The law in the circuit, though, clearly foreshadowed its opinion in this case. In *Dufrin* v. *Spreen,* 712 F. 2d 1084 (6th Cir. 1983), the Sixth Circuit considered whether a woman's Fourth Amendment rights were violated when she was strip-searched after being arrested on a warrant which charged that she had assaulted her step-daughter with a broom handle. The Sixth Circuit found that the strip-search did not violate the Fourth Amendment because the plaintiff was arrested for felonious assault, a violent crime. The Sixth Circuit specifically distinguished cases like *Logan* v. *Shealy and Tinetti* v. *Wittke, supra,* because those cases "involved misdemeanors, traffic offenses or similar minor offenses not normally associated with weapons or contraband." *Id.* at 1088.

In *Fann* v. *City of Cleveland, supra,* the district court analyzed the Sixth Circuit's opinion in *Dufrin.* The district court noted that because *Dufrin* involved a felony, the Sixth Circuit had not considered the constitutionality of blanket strip-searches of minor offenders. As stated by the district court in *Fann:*

> The constitutional issue left unanswered in *Dufrin* must now be decided. . . . Because the record

> indicates that [the plaintiff] was strip-searched following arrest for minor offenses and that no police officer possessed any reasonable suspicion that she was carrying or concealing contraband, her Fourth and Fourteenth Amendment rights were violated.

616 F. Supp. at 312-13.

The opinions of other circuit courts, directly on point, left the Sixth Circuit no choice but to reject Petitioners' claim of qualified immunity. For instance, in *Weber* v. *Dell, supra,* a minor offender was strip-searched before entering the general jail population pursuant to a policy requiring the strip search of all inmates except those placed in "holding cells." The Second Circuit joined "ten opinions from seven [other] circuits that succeeded *Wolfish* and 'refused to condone strip/body cavity searches of *all* arrestees entering the jail'." 804 F. 2d at 801, *quoting Weber* v. *Dell,* 650 F. Supp. 255, 259 (W.D. N.Y. 1986) (emphasis in original). In condemning the search of the plaintiff as unconstitutional, the Second Circuit held that only a "reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest" can legitimize "so intrusive and demeaning an investigative procedure as a strip/body cavity search." 804 F. 2d at 802. In *Walsh* v. *Franco,* 849 F. 2d 66 (2nd Cir. 1988), the Second Circuit reaffirmed its conclusion in *Weber* that the constitutional prohibition against strip-searching

minor offenders simply because they were about to enter the general population of a jail had been clearly established *since June of 1983*. *Id.* at 69. The Second Circuit's opinions in *Weber* and *Walsh* were also consistent with the opinions of other federal courts that had repeatedly held that blanket strip-searches of minor offenders could not be justified on the basis of administrative convenience. *See, e.g., Hill* v. *Bogans, supra,* at 394; *Logan* v. *Shealy, supra* at 1013; *Tinetti* v. *Wittke, supra,* at 490-91.

Given these authorities, there could be no question in the minds of the panel below that the unlawfulness of Petitioners' conduct was apparent in the light of pre-existing law.

III. *Dobrowolskyj* v. *Jefferson County* is Irrelevant to This Case.

The Sixth Circuit's opinion in *Dobrowolskyj* v. *Jefferson County,* 823 F. 2d 955 (6th Cir. 1987), *cert. denied,* — U.S. —, 108 S. Ct. 1012 (1988), on which Petitioners place so much reliance, was rendered after, not before, Respondent's strip-search. Thus, it could not form a part of the *pre-existing* law on which Petitioners could have relied in strip-searching Respondent. Moreover, *Dobrowolskyj* is clearly distinguishable from this case and supports Respondent's position, not Petitioners'.

In *Dobrowolskyj,* the Sixth Circuit considered the very strip-search policy in issue in this case. The court held that the policy was constitutional as applied to the appellant only after noting that "Dobrowolskyj was

not charged with a traffic offense or other minor misdemeanor but with menacing. . . ." Having distinguished Dobrowolskyj from minor offenders like Respondent, the Court continued: "*Based upon the nature of the menacing charge,* the jail official certainly had . . . reason to suspect Dobrowolskyj of concealing weapons or other contraband. . . ." *Id.* at 958 (emphasis added).

Dobrowolskyj, then, does not expressly or implicitly approve Petitioners' strip-search of a minor offender like Respondent. The Sixth Circuit's opinion in *Dobrowolskyj* is characterized throughout by its recognition that "[m]enacing is an offense that is associated with weapons, and may well raise a reasonable suspicion on the part of the jail officials that a person detained on that charge may be concealing weapons or other contraband." Accordingly, the Sixth Circuit had little difficulty in concluding that in the circumstances of Dobrowolskyj's case, "[t]he jail had a legitimate interest in preventing the flow of contraband into the other sections of the jail," and that "the security interest of the jail outweigh[ed] the privacy interest of the inmates. . . ." *Id.* at 958-59. These security considerations simply were not present in Respondent's case. It was for these reasons that the Sixth Circuit and the district court concluded that *Dobrowolskyj* was inapplicable to this case.

IV. The *Tate* v. *Frey* Consent Decree Does Not Immunize Petitioners' Strip-Search of Respondent.

As has already been discussed, Petitioners strip-searched Respondent pursuant to a local jail policy, not the Consent Decree in *Tate* v. *Frey,* No. 75-0031-L(A). That policy required that "[a]ll newly admitted inmates to the department . . . be . . . strip-searched immediately prior to" entering the jail's general population (Petition, p. 12, n. 4). The policy therefore prescribes conduct squarely condemned by *Weber* v. *Dell, supra,* and other similar cases. The Consent Decree neither justifies nor endorses such a policy.

The Consent Decree was entered by Judge Charles M. Allen on October 1, 1985. It covers four subclasses of inmates in the Jefferson County Jail, which are defined in Judge Allen's Order Certifying Class of August 15, 1980. Female inmates are broken into two subclasses, one for those serving sentences for misdemeanor or felony *convictions,* and the other for those in jail *awaiting trial* (Petition, p. 49a).

The purpose of these classifications was "to insure accuracy with a view toward removing low-risk inmates from the jail's population whenever possible" (Petition, pp. 57a-58a). Petitioners were directed to "establish policies addressing the search of inmates and inmate's property [that] provide for the avoidance of unnecessary force, embarassment or indignity to the inmates" (Petition, p. 68a). It was pursuant to this requirement that the internal policy that governed

Respondent's strip-search was subsequently promulgated. The Consent Decree then provided as follows:

> d. All inmates entering or leaving the security perimeter will be strip-searched, except inmates in the front holding area who will only be strip-searched upon *reasonable belief* that a strip-search is required for security purposes as described in item "g" below.
>
> * * * * *
>
> g. All inmates are subject to strip-search upon *reasonable belief* that the inmate will be in possession of contraband.

(Petition, pp. 69a-70a).

The Consent Decree extends only to convicted female inmates and those incarcerated while waiting for trial. It does not apply to Respondent. She was not formally charged with a crime or arraigned. In fact, she was released without a hearing, without bail and on her own recognizance after her arrest and strip-search.[1]

Moveover, even a brief comparison of Petitioners' internal strip-search policy with the provisions of the Consent Decree reveals significant differences. The

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[1]There is no support for Petitioners' claim that both of the lower courts concluded that Respondent was a member of the subject class (Petition, pp. 10-11). The district court's "finding" is part of its recitation of Petitioners' arguments (Petition, p. 21a-22a). The Sixth Circuit's "finding" is merely an acknowledgment that the district court found that the strip-search was the result of a local jail policy promulgated pursuant to the Consent Decree (Petition, p. 4a).

Consent Decree prohibits the strip-search of inmates entering the "security perimeter" from "the front holding areas"—where Respondent was originally held —unless there exists "reasonable belief that the inmate will be in possession of contraband". These limitations do not appear in the internal policy that governed Respondent's strip-search. More importantly, there is no explanation or justification for Petitioner's abandonment of the "reasonable belief" requirement set forth in the Consent Decree. If the "front holding areas" are to be considered part of the "security perimeter," then there is nothing in the Consent Decree to justify the strip-search of an inmate once he or she is moved from the front holding area to another part of the security perimeter except a reasonable belief that the inmate may have contraband. If the "front holding areas" are not part of the "security perimeter," then the Consent Decree can be read either to except inmates in the front holding areas from the general strip-search policy generally, or only when they are in the front holding areas.

If the Consent Decree does not affirmatively prohibit the strip-search that occurred in this case, in letter or spirit, then it is at most ambiguous and must be interpreted in a manner consistent with pre-existing law. Judge Edward H. Johnstone, the district court judge in this case, was constrained by his own opinion in *Kendrick* v. *Bland,* 586 F. Supp. 1536 (W.D. Ky. 1984), in which he held:

> In the context of civil rights cases, the purpose of an ambiguous provision [of a consent decree] should be determined, not only by reference to contractual aids to construction, *but also by reference to the constitutional rights sought to be vindicated in the litigation.* . . . Civil rights consent decrees are distinctive in their attempt to protect basic individual liberties. The court must insure these liberties are not frustrated by an overly narrow construction of the decree.

Id. at 1548 (emphasis added).

There is nothing in the Consent Decree to endorse or support a policy of strip-searching minor offenders simply because they are about to intermingle with the jail's general population.

More importantly, consent decrees are not "law" and address no legal principle. A consent decree is, essentially, a contract between parties to a dispute to resolve their differences and settle litigation. *Firefighters* v. *Cleveland,* 478 U.S. 501, 519 (1986); *Kasper* v. *Board of Election,* 814 F. 2d 332, 338 (7th Cir. 1987); *Collins* v. *Thompson,* 679 F. 2d 168, 170 (9th Cir. 1982). As this Court noted in *United States* v. *Armour & Co.,* 402 U.S. 673, 681-82 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compro-

> mise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus, the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.

For this reason, consent decrees offer the signatories no immunity from liability for illegal or unconstitutional conduct. For example, in *Birmingham Reverse Discrimination Litigation,* 833 F. 2d 1492 (11th Cir. 1987), *cert. granted on other grounds, Martin* v. *Wilks,* — U.S. —, 108 S. Ct. 2843 (1988), the court "reject[ed] any notion that the memorialization of [a] voluntary [affirmative action plan] in the form a consent decree somehow provides the employer with extra protection against charges of illegal discrimination." *Id.* at 1501.

Like the employer in *Birmingham,* Petitioners had no right to rely on a consent decree as protection against liability for systematic violations of constitutional rights. The *Tate* v. *Frey* Consent Decree does not have the legal significance required to immunize Petitioners' conduct in this case, and was irrelevant to the "clearly established law" that controlled the Sixth Circuit's decision below.

CONCLUSION

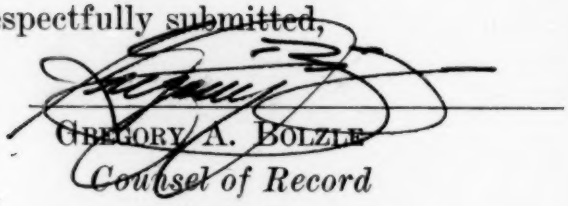
Both the district court and the Sixth Circuit were required to rule as they did by the magnitude of federal and state authority that has found no excuse for blanket strip-searches of minor offenders.

Although Petitioners pay lip-service to the balancing test prescribed by *Bell* v. *Wolfish, supra*, they seek to replace its requirement that the search be *justified* with the mere existence of a consent decree they claim permits blanket strip-searches of minor offenders. *Wolfish's* rule of reason cannot be abandoned on such an arbitrary and potentially abusive basis.

Even more ominous is Petitioners' contention that the agreement they fashioned in *Tate* v. *Frey* has the force of law and shields them from liability for conduct condemned by every published state or federal case addressing the question since 1966. The "clearly established law" cannot be rendered moot by a mere agreement to settle pending litigation unless this Court is willing to surrender fundamental constitutional principles to the "compromise" that "the respective parties have the bargaining power and skill to achieve." *United States* v. *Armour & Co., supra.*

Accordingly, Respondent requests that the Petition be denied.

Respectfully submitted,



GREGORY A. BOLZLE
Counsel of Record

PATRICK W. MICHAEL
WOODWARD, HOBSON & FULTON
2500 First National Tower
Louisville, Kentucky 40202
(502) 585-3321

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Respondent's Brief in Opposition were served this 17th day of November, 1989, upon N. Scott Lilly, First Assistant County Attorney, 1001 Fiscal Court Building, Louisville, Kentucky 40202, Counsel for Petitioners, by depositing said documents in a United States Post Office mailbox, first-class postage prepaid, and addressed to the foregoing counsel of record at his above post office address, all in conformity with Supreme Court Rule 28.3. Pursuant to Supreme Court Rule 28.5, all parties required to be served with copies of this Brief have been served.

GREGORY A. BOZZLE
Counsel for Respondent